IN THE

Supreme Court of the United States

NO. 76-696

POWELL MANUFACTURING COMPANY, INC.,
Appellant,

-VS.-

HARRINGTON MANUFACTURING COMPANY, INC.,
Appellee.

HARRINGTON MANUFACTURING COMPANY, INC.,
Appellee,

-VS.-

POWELL MANUFACTURING COMPANY, INC.,
Appellant.

JURISDICTIONAL STATEMENT

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CITATIONS

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JURISDICTIONAL STATEMENT

Appellant, POWELL MANUFACTURING COMPANY, INC., (POWELL) makes the following jurisdictional statement in support of its appeal to the Supreme Court of the United States from the Supreme Court of North Carolina:

THE JUDGMENTS, OPINIONS, AND ORDERS BELOW

The judgment and decree of the Supreme Court of North Carolina is reported in part at 290 N.C. 662 of the official reports, and is set forth in the Appendix to this Jurisdictional Statement. See also 228, S.E. 2d 454.

The opinion of the North Carolina Court of Appeals is reported in 30 N.C. App. 97, 226 SE2d 173 (1976), and is appended.

The Orders of the Superior Court in Mecklenburg County and Bertie County assigned as error are not reported, but are appended.

JURISDICTION

Nature of the Proceeding

The two cases here, involving private damage actions between competing manufacturers of farm machinery, were consolidated in the Trial Court. In each case, §75-1.1 of the North Carolina General Statutes was drawn in question in the State Courts by POWELL on the ground of its being repugnant to the First and Fourteenth Amendments of the Constitution of the United States. The final decision was in favor of its validity. The Statute carves out a major new category of exceptions to the First Amendment guarantee of free speech —unfair commercial speech. Section 75-16 mandatorily punishes such speech with treble damages. These unfair practices laws are given a "broad" interpretation in the State Courts and a vast extra-territorial effect.

Section 75-1.1 (a) of the North Carolina General Statutes (G.S. 75-1.1 (a)) tracks the language of 15 U.S.C.A. §45 (a) (1) captioned "Unfair Methods of Competition Unlawful". The State enactment entirely omits any provision comparable to the Federal false advertising laws, 15 U.S.C.A. §52 (a) and (b), §54 (a), and §55. The effect of the interpretation given the State laws in the State Courts is that the extent of commercial speech claims within the purview of G.S. 75-1.1 (a) is

limited only by the statutory words "unfair" or "deceptive".

The POWELL advertisements alleged in the HARRINGTON Complaint are unrelated to and would not fall within any of the Federal false advertising definitions or provisions even if adopted. In addition to the constitutional infirmity of the Statute in question, POWELL contends the particular commercial speech used in the alleged ads is constitutionally privileged as a matter of law.

POWELL seeks here to have G.S. 75-1.1 and G.S. 75-16 held violative of the First and Fourteenth Amendments of the United States Constitution. The State Courts finally determined in these cases that those sections constitutionally include commercial speech within their purview.

The two cases here are believed to be of first impression in presenting the question whether unfair practices statutes like G.S. 75-1.1 include the content of commercial speech within their purview, and if so, what the free speech and due process consequences are under the United States Constitution.

Date of Decree

The decree of the Supreme Court of North Carolina in the form of the two (2) "Orders" entered in each case in conference on September 1, 1976, is dated September 1, 1976. (Appendix A)

No Order respecting a rehearing is known to counsel.

The Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of North Carolina on the 24th day of September, 1976. (Appendix E)

Statute Conferring Jurisdiction

The statutory section believed to confer on this Court jurisdiction of the Appeal is 28 U.S.C.A. §1257 (2). The statute believed to confer alternative jurisdiction is 28 U.S.C.A. §2103.

Cases Sustaining Jurisdiction

Cases believed to sustain jurisdiction are:

1. G.S. 75-1.1, as construed and interpreted in the State Courts, violates commercial speech freedoms guaranteed by the First Amendment of the United States Constitution:

Virginia State Board of Pharmacy, et al., v. Virginia Citizens Consumer Council, Inc., et al., — US — , 96 S.Ct. 1817 (1976);

Buckley v. Valeo, 424 US 1, 96 S.Ct. 612 (1976);

Bigelow v. Commonwealth of Virginia, 421 US 809, 95 S.Ct. 2222 (1975);

Gertz v. Robert Welch, Inc., 418 US 323; 94 S.Ct. 2997 (1974);

Greenbelt Cooperative Publishing Association, Inc., et al., v. Bresler, 398 US 6, 90 S.Ct. 1537 (1970);

Curtis Publishing Co. v. Butts, 388 US 130, 87 S.Ct. 1975 (1967);

Time, Inc., v. Hill, 385 US 374, 87 S.Ct. 534 (1967);

Linn v. United Plant Guard Workers of America, Local 114, et al., 383 US 53, 86 S.Ct. 657 (1966);

Cox v. Louisiana, 379 US 536, 85 S.Ct. 453 (1965);

Garrison v. Louisiana, 379 US 64, 85 S.Ct. 209 (1964);

The New York Times Company v. Sullivan, 376 US 254, 84 S.Ct. 710 (1964).

2. G.S. 75-1.1 as interpreted in the State Courts violates the Due Process Clause of the Fourteenth Amendment:

Ashton v. Kentucky, 384 US 195, 86 S.Ct. 1407 (1966);

Cramp v. Board of Public Instruction, 368 US 278, 82 S.Ct. 275 (1961).

3. The "Orders" of the Supreme Court of North Carolina appended hereto are a final judgment or decree within the meaning of 28 U.S.C.A. §1257 (2):

Cox Broadcasting Corporation, et al., v. Cohn, 420 US 469, 95 S.Ct. 1029 (1975);

Rosenblatt v. American Cyanamid Company, 86 S.Ct. 1 (1965);

Mercantile National Bank at Dallas v. Langdeau, 371 US 555, 83 S.Ct. 520 (1963);

Rio Grande Western Railway Company v. Stringham, et al., 239 US 44, 36 S.Ct. 5 (1915).

4. The questions presented in this Appeal are substantial under the United States Constitution, Fourteenth and First Amendments:

Zucht v. King, et al., 260 US 174, 43 S.Ct. 24 (1922);

Atlantic Coast Line Railroad Company v. City of Goldsboro, 232 US 548, 34 S.Ct. 364 (1914).

Statutes Involved

Section 1.1 of Chapter 75 of the General Statutes of North Carolina appears in Volume 2 C of the General Statutes of North Carolina (Replacement Volume 1975) at page 180, as follows:

"§75-1.1 Methods of competition, acts and practices regulated; legislative policy.—

"(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

"(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

"(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

"(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim. (1969, c. 833.)"

Section 16 of Chapter 75 of the General Statutes of North Carolina appears in Volume 2 C of the General Statutes of North Carolina (Replacement Volume 1975) at pages 189 and 190, as follows:

"§75-16. Civil action by person injured; treble damages.—If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, s. 14; C.S., s. 2574; 1969, c. 833.)"

Questions Presented

(1) Does Section 75-1.1 (in conjunction with Section 75-16) of the North Carolina General Statutes as construed by the North Carolina Courts, a penal statute providing a competitor treble damages in claims founded on commercial speech, violate the First and Fourteenth Amendments of the United States Constitution by reason of: (a) overbreadth and lack of First Amendment standards; (b) infringement of constitutionally privileged commercial speech; or (c) vagueness or ambiguity in the definition of commercial speech claims for which treble recovery is mandated?

(2) Does the highest State Court's final judgment or decree tolerating an overbroad, vague and ambiguous State penal statute in the area of First Amendment freedoms present a substantial question under the Constitution and laws of the United States when the Statute

is enforced in this consolidated record for the dual purpose: (a) of sustaining Appellee's Complaint against Appellant for treble damages founded on commercial speech alleged to have been published in widespread areas of the world; and (b) of sustaining a judgment dismissing Appellant's action?

STATEMENT OF THE CASE

HARRINGTON filed a Complaint against POWELL in Bertie County Superior Court on September 12, 1974, amended December 6, 1974. HARRINGTON'S Complaint alleges POWELL,

> "has advertised in the States of North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, and Virginia, and in Canada, South America, Europe, Australia, and South Africa, and at other places, that the Powell Tobacco Combine, manufactured, distributed, and sold by the defendant, is the only tobacco combine that primes lugs through tips and that it owns the 'exclusive CutterBar' for priming tips. That advertisements as herein alleged have appeared in the *Progressive Farmer, Southeast Farm & Livestock Weekly,* the *Canadian Tobacco Grower,* and other periodicals, and have been broadcast upon radio and television stations throughout the Southeast United States and other places.
>
> "IV. That the plaintiff manufactures a tobacco harvester which primes lugs through tips and holds a license to manufacture, sell and distribute the splinter-knife type defoliator, which is the same device advertised by the defendant as 'exclusive CutterBar'.
>
> . . .

> "VI. That said advertisements by the defendant constitute unfair methods of competition with the plaintiff and is a deceptive act declared unlawful by North Carolina General Statutes 75-1.1 . . ."

The Complaint demands $10,000,000.00 actual and also treble damages (R. Filed C.A., pp. 37-44).

HARRINGTON *did not allege* it manufactured or had for sale a Splinter patented knife-type defoliator like POWELL's CutterBar during the period POWELL'S ads were published. HARRINGTON *did not allege* POWELL advertised it had an *exclusive license* under the Splinter patent. HARRINGTON *did not allege* it held a license under the Splinter patent at the time of the POWELL advertisements alleged in its Complaint, nor did HARRINGTON allege that POWELL'S CutterBar would not prime from lugs to tips. (R. Filed C.A., pp. 41-43). The entire record in this case is devoid of any suggestion that any license, other than the one issued to POWELL, had been issued under the Splinter patent at the time of POWELL'S alleged advertisements. HARRINGTON *did not allege* POWELL mentioned HARRINGTON or its products in the alleged publication.

The omission of all these allegations by HARRINGTON was not oversight. HARRINGTON could not truthfully so allege.

In point of fact, as alleged in POWELL'S answer (R. Filed C.A., pp. 46-48) and admitted in the deposition[1] of HARRINGTON'S President, HARRINGTON neither held a license under the Splinter patent nor manufac-

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[1] "'Q. Did you actually deliver one or more of the Hydro-synchronized Blade Assemblies in 1974?

'A. Nope.

* * * *

'A. Powell Manufacturing Company manufactures the blade assembly that we purchase.

'Q. And so, Powell Manufacturing Company actually manufactured the blades on the assembly, which you showed in Ahoskie?

'A. The blades that we showed in Ahoskie was manufactured by them.

* * * *

'Q. Was the part manufactured by Powell Manufacturing Company the whole operating blade assembly?

'A. It was. The part manufactured by them was the complete blade assembly with the exceptions of the hydro-synchronizing unit, which we installed.'

. . .

'Q. You do not, or Harrington Manufacturing Company does not, now have a license to make and sell the Splinter patented blades or knives?

'A. The lawyers have been working on this for some time. We have been offered it. They have been trying to get us to take it, frankly, for the last two or three years. We only reserve the right to have it and we informed them so, I would say as much as three months ago, that we wanted the rights. They have assured us that the lawyers are drawing this up and that it should be in any time.'

"(Deposition of Joseph Julian Harrington, November 1, 1974, pp. 9, 12, 32-33)". Appellant's Brief filed C.A. February 23, 1976, pp. 34, 35.

tured such a device at the time of the filing of its original Complaint. At that time, the only tobacco harvester manufactured and sold by HARRINGTON removed tobacco leaves with a downward wiping action, not as suitable at the flexible tip of the stalk as Powell's Cutter-Bar operating on an upward cutting action of blades.

POWELL filed a G.S. 1A-1, Rule 12 (b) (6)[2] Motion to Dismiss HARRINGTON'S Complaint for failure to state a claim upon which relief can be granted in Bertie Superior Court, which overruled it. POWELL excepted. (R. Filed C.A., pp. 45, 46).

POWELL answered, alleging that at the time of the alleged ads, POWELL sold a tobacco combine attachment by its trade name "CutterBar" designed especially for priming tobacco at the tips of the stalks, which worked efficiently at that task with an upward cutting action of blades and was, at the time of such advertising, the only like implement sold on the market. POWELL further alleged that its advertisements were true, or that it believed they were true. POWELL further alleged it

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[2] "Rule 12. Defenses and objections—when and how presented —by pleading or motion—motion for judgment on pleading.

. . .

"(b) *How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:

. . .

"(6) Failure to state a claim upon which relief can be granted,

"

. . ."

had, at the time of the advertisements, information it believed reliable that HARRINGTON'S downward wiping defoliator did not work well at the flexible tips of the tobacco stalk.

POWELL sued HARRINGTON in Mecklenburg County Superior Court, the County of its principal office, on November 4, 1974. The Complaint as amended May 13, 1975, alleged two (2) claims. The first claim alleged in essence that HARRINGTON, not itself manufacturing a Splinter patented blade assembly for removing tobacco leaves at the flexible tip, did take a CutterBar manufactured and sold by POWELL, mount it on a HARRINGTON harvester, and falsely demonstrate it, beginning September 28, 1974, as HARRINGTON'S "Hydro-Synchronized Blade Assembly", a "dramatic break-through". POWELL'S first claim is for conduct known in the law of unfair competition as "passing off". The allegation was that HARRINGTON misappropriated POWELL'S achievements in research and engineering development which made the Splinter patented innovation a commercially practicable production line machine. The Court of Appeals referred to this claim as a "false advertising" claim (226 SE2d at p. 175), a misnomer in constitutional concepts because conduct, not speech content, is involved. POWELL'S second claim involves certain unfair advertising practices with respect to tobacco barns by HARRINGTON. Both claims alleged violation of G.S. 75-1.1.

HARRINGTON moved in Mecklenburg Superior Court on November 21, 1974, to dismiss POWELL'S Complaint in that it was said to be a compulsory counterclaim[3] to HARRINGTON'S Bertie County Complaint, and the Mecklenburg Court, therefore, lacked jurisdiction.

The Mecklenburg Superior Court in response to HARRINGTON'S motion, reviewing the Bertie Complaint, found expressly that: "Harrington Manufacturing Company, Inc., filed an action in Bertie County . . . alleging unfair methods of competition and unfair trade acts or practices on the part of Powell Manufacturing Company, Inc., *within the scope and purview of NCGS §75-1.1.*" (Emphasis added.) POWELL excepted to this finding. (Appendix D). (Record Filed C.A., p. 33.) Resulting from this finding, the Mecklenburg Superior Court held POWELL'S Complaint to be a compulsory counterclaim and ordered it transferred to Bertie County and consolidated with HARRINGTON'S action there pending. POWELL appealed from that order to the North Carolina Court of Appeals. (Record Filed C.A.,

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[3]G.S. 1A-1, Rule 13 provides:

"Rule 13. Counterclaim and Crossclaim.

"(a) *Compulsory counterclaims.*—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

"(1) At the time the action was commenced the claim was the subject of another pending action, or

"(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

. . ."

p. 36.) POWELL assigned as error (among others) the two (2) exceptions above set out upon the ground the Bertie claim is not "within the purview of North Carolina General Statute §75-1.1". (Assignment No. 2, Record Filed C.A., p. 49.)

POWELL, in its Brief, submitted to the Court of Appeals the question on appeal:

> "II. Do the Orders of Judges Hasty and Martin assigned as error, and GS §75-1.1 as so construed, violate . . . the First . . . and Fourteenth Amendments of the Constitution of the United States?" (Appellant's Brief, filed C.A., p. 2).

POWELL argued in its Court of Appeals Brief that both Mecklenburg and Bertie Superior Courts erred in holding HARRINGTON'S Complaint to state a claim within the purview of G.S. 75-1.1 because the Statute as so construed violates the *New York Times* standard, violates due process for vagueness and ambiguity and infringes constitutionally privileged speech. (Appellant's Brief, Filed C.A. pp. 12-37.) Purview means "body of a statute" and "limit of authority". *Webster's Third New International Dictionary*. POWELL further argued that the POWELL Complaint could not be a compulsory counterclaim because a "plaintiff must have a claim before a defendant is required to assert a compulsory counterclaim." *Lawhorn v. The Atlantic Refining Co.*, 288 F2d 353,356 (5th Cir. 1962). The HARRINGTON Complaint not constitutionally stating a claim within the purview of G.S. 75-1.1, the POWELL Complaint *a fortiori* is not a counterclaim.

The Court of Appeals found that:

> "On 12 September 1974 . . . Harrington Manufacturing Company, Inc., . . . brought action number 74CVS459 in Bertie County, alleging that defendant Powell falsely and fradulently advertised . . . the 'exclusive CutterBar' . . . Harrington maintained . . . this course of advertising fostered unfair trade competition . . . and constituted a deceptive act under G.S. 75-1.1 et seq." 226 SE2d at p. 174.

The Court of Appeals held POWELL'S constitutional contentions "to be without merit" and POWELL'S claim therefore to be a compulsory counterclaim. 226 SE2d at p. 175. The Court of Appeals accordingly ordered that POWELL'S Mecklenburg Complaint be dismissed. The decision of the Court of Appeals expressly resulted from the holding that both Complaints stated "false advertising" claims within the purview of G.S. 75-1.1. 226 SE2d at p. 175. HARRINGTON in its Motion to Dismiss POWELL'S Appeal for lack of a substantial constitutional question in the North Carolina Supreme Court accurately notes the actions of the lower State Courts:

> "Neither the Bertie or Mecklenburg Superior Courts nor the Court of Appeals have shown any difficulty in viewing the alleged actions of plaintiff as coming within the purview of the forbidden practices of said Statute. Respondent respectfully submits that the action complained of in its complaint constitutes a matter prohibited by the Statute and that in no way have the constitutional rights of petitioner been violated or infringed." (Appendix B-2)

POWELL filed a Notice of Appeal and Petition for Discretionary Review in the Supreme Court of North Carolina on August 9, 1976, upon the grounds of violation of POWELL'S rights under the First and Fourteenth Amendments of the United States Constitution by G.S. 75-1.1 and the lower Court rulings pertaining thereto.

(Appendix B-1). POWELL cited therein *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra.* The Record and briefs filed in the Court of Appeals were certified by the Clerk of that Court to the Supreme Court pursuant to the Appellate Rules.

HARRINGTON then filed the above-noted Motion to Dismiss the appeal upon the ground of, "advertising by a competitor that . . . if untrue, constitutes an unfair method of competition and an unfair or deceptive act or practice prohibited by the North Carolina Statute. There is no logical reason to support petitioner's argument in its brief that because the Federal Statute has a subdivision pertaining to advertising per se that this, in itself negatives the intent of the North Carolina legislature to include such acts within the above cited statute." (Appendix B-2)

The ruling of the Supreme Court of North Carolina was that the "Motion to dismiss the appeal for lack of a substantial constitutional question is filed with the following order: 'Allowed by order of the Court in Conference this 1st day of September, 1976. Exum, J., For the Court.' " (Appendix A-1)

The Supreme Court further allowed POWELL'S Petition for Discretionary Review in order to affirm the Court of Appeals' dismissal of POWELL'S Mecklenburg County action. (Appendix A-2)

SUBSTANTIAL CONSTITUTIONAL QUESTION

The validity of G.S. 75-1.1 was more than formally drawn in question in the State Courts. See *Zucht v. King,* 260 US 174, 43 S.Ct. 24 (1922). Far from being supported by settled authority, the Statute in question is in

direct conflict with First Amendment rights enunciated by this Court in a line of published opinions stretching from *New York Times Company v. Sullivan,* 376 US 254, 84 S.Ct. 710 (1964) to the most recent, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* —US—, 96 S.Ct. 1817 (1976).

Section 75-1.1 of the General Statutes might have been given a limited interpretation pursuant to the rule, "If a statute is susceptible of two interpretations, one constitutional and the other not, the former will be adopted. [citations omitted]. Even to avoid a serious doubt as to constitutionality, the rule is the same. *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 US 1, 57 S.Ct. 615 . . ." *City of Randleman v. Hinshaw,* 267 NC 136, 141, 147 SE2d 902, 906 (1966). See also *State v. National Food Stores, Inc.,* 270 NC 323, 331, 154 SE2d 548, 554-55 (1967).

The State Courts might have limited the effect of the Statute in question, as urged by POWELL in the Courts below, to conduct of parties and not the content of speech. This would seem the natural and plain meaning of the Statute.

Ample authority for such an interpretation is to be found in the Statute's phraseology, "acts or practices" and "dealings between persons engaged in business, and between persons engaged in business and the consuming public within the state", and "fair dealings between buyers and sellers". There is in the Federal Statutes above-cited no language comparable to the "dealings between" and "buyers and sellers" phraseology of the State Statute. Furthermore, the State Legislature did not enact any part of the Federal false advertising laws and definitions as a part of the State laws. These differences, reasonably construed, would seem to mani-

fest a legislative intention to exclude from coverage of the Statute the type commercial speech claim alleged in this case.

The State Courts rejected an interpretation excluding speech content and chose instead the very broadest possible interpretation of the Statute. This was done notwithstanding POWELL'S argument that "to give the Statute an interpretation contrary to its express language . . . would render it void as a violation of our Constitutional provision, . . ." *Sutton v. Davenport*, 258 NC 27, 30, 128 SE2d 16, 19 (1962).

The rule of statutory construction inherent in the interpretation in the present case is made express by the North Carolina Court of Appeals in a case decided a month later. The Court of Appeals held: "G.S. 75-1.1 should be interpreted to grant broad relief against 'unfair or deceptive acts or practices in the conduct of any trade or commerce.'" *State of North Carolina ex rel Rufus L. Edmisten v. J. C. Penney Company, Inc.*, — NC App. —, —, 227 SE2d 141, 143 (1976).

For the purposes of this proceeding, the Statute means what the State Courts have held that it means. This rule was stated in *Atlantic C.L.R. Company v. Goldsboro*, 232 US 548, 34 S.Ct. 364, 366 (1914):

> "It is, among other things, contended by plaintiff in error that the ordinances are not within the powers conferred by the legislature of North Carolina upon the municipal corporation. This is a question of state law, which, for present purposes, is conclusively settled by the decision of the supreme court of North Carolina in this case. [Authority omitted]."

The holding of *Goldsboro* is in point with the present case not only in the interpretation to be given State

Statutes in this Court, but also in being made in the context of a Constitutional decision, this Court there saying: "The present writ of error . . . is based upon the insistence, made in the state courts and there overruled, that the ordinances impair the obligation of the contract . . . in contravention of §10 of art. 1, of the Federal Constitution . . ." 34 S.Ct. at p. 366.

Free Speech

> "Advertising . . . is . . . dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, —US—, 96 S.Ct. 1817, 1827 (1976).

The present case is before this Court upon POWELL'S insistence made in the State Courts, and there overruled, that G.S. 75-1.1 as construed in the Superior Courts infringes POWELL'S commercial speech rights under the Fourteenth and First Amendments of the Constitution of the United States.

POWELL believes G.S. 75-1.1 violates the free speech provisions of the Fourteenth and First Amendments in the following ways, which will be taken up seriatim:

(1) OVERBREADTH OF G.S. 75-1.1.

The State Courts have not interpreted G.S. 75-1.1 (b) as limiting the application of G.S. 75-1.1 (a) either to

conduct or to actions between or among the categories of persons mentioned in G.S. 75-1.1 (b). The only limitations on the breadth of construction of G.S. 75-1.1 (a), therefore, are its two words, in the alternative, "unfair" or "deceptive".

One man's unfairness or deception might be another's integrity, perhaps depending more on personal opinion and cultural background than anything else. The Statute does not define "unfair", nor limit "deceptive" to misrepresentations of material fact, nor in any way limit unfair competition claims to those recognizable at common law. Historically, the "absence of any clear-cut theory of unfair competition suggests that suit can only be predicated on the theory of passing off or on such other wrongful acts as are within the law of torts, such as trespass upon property, inducement to breach of contract and interference with relations, breach of trust, libel and slander, fraud, conspiracy . . . *False or misleading advertising was not recognized as unfair competition . . .*" (Emphasis added.) 1 Callman, *The Law of Unfair Competition* (3rd Ed.) §4.1, pp. 114, 115. "'A tradesman who offers goods for sale exposes himself to observations of this kind, and it is not by averring them [advertisements] to be false, scandalous, and malicious and defamatory that the plaintiff can found a charge of libel upon them.'" *Nonpareil Cork Mfg. Co. v. Heasbey & Co.*, 108 F 721 (3rd Cir. 1901).

This Court in an opinion by Mr. Justice Holmes held as a matter of law that a competitor, when he does not have a monopoly position, can have no recovery against a false advertiser. *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 US 132, 47 S.Ct. 314 (1927). Such a cause of action would open "a Pandora's box of litigation". *American*

Washboard Co. v. Saginaro Mfg. Co., 103 F 281, 286 (6th Cir. 1900).

The Statute in question, allowing claims without precedent in the area of commercial speech, will permit trial judges and juries henceforth to innovate and experiment with new and imaginative theories of treble recovery in the area of First Amendment freedoms guided only by their personal dictates and preferences—unless this appeal is sustained. The threat to free speech is real, immediate and incalculable.

POWELL argues below that the speech in question is constitutionally privileged. Without regard, however, to whether this is so or not, POWELL has standing to challenge the Statute as facially overbroad. This rule has been stated in *Bigelow v. Virginia*, 421 US 809, 95 S.Ct. 2222 (1975) as follows:

> "This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' [Authority omitted.]" 95 S.Ct. at p. 2229.

The reason for the rule is stated to be "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application," *Bigelow*, 95 S.Ct. at p. 2230. The penal statute in the instant case could not be more aptly characterized.

Bigelow included in the area of First Amendment freedoms newspaper advertising which "contained factual material of clear 'public interest' ". 95 S.Ct. at p. 2232. *Virginia State Board of Pharmacy* next held:

> "Our question is whether speech which does 'no more than propose a commercial transaction', . . . is so removed from any 'exposition of ideas', . . . that it lacks all protection. Our answer is that it is not". 96 S.Ct. at p. 1826.

The POWELL advertisements alleged in the HARRINGTON Complaint fit in the protected areas of both *Bigelow* and *Virginia State Board*. They contained material of clear interest to a major segment of the public, tobacco farmers, over widespread areas, *i.e.*, the POWELL CutterBar worked better than any other harvester at the tip of the stalk. The ads also, of course, were intended to invite "a commercial transaction".

POWELL'S speech alleged in the HARRINGTON Complaint is, therefore, not without constitutional protection. POWELL has standing to challenge the Statute, G.S. 75-1.1, which is clearly overbroad, much more so than the breach of the peace statute voided by this Court in *Cox v. Louisiana*, 379 US 536, 551, 552, 85 S.Ct. 453, 462, 463 (1965).

(2) THE STATUTE INFRINGES CONSTITUTIONALLY PRIVILEGED SPEECH.

The words "only" and "exclusive", of which HARRINGTON complains, are mere hyperbole. *Carlay Co. v. FTC*, 153 F2d 493 (7th Cir. 1946) involved a suit against a maker of diet candy who represented his diet plan as "easy" when, in fact, it involved a rather restricted diet. The Court held:

> "such words as 'easy', 'perfect', 'amazing', 'prime', 'wonderful', 'excellent', are regarded in law as mere puffing or dealer's talk upon which no charge of misrepresentation can be based." [Citations omitted.] 153 F2d 493, 496.

In *Nonpareil Cork Mfg. Co. v. Heasbey and M. Co.*, 108 F 721 (3rd Cir. 1901), the Court held Defendant's charge that Plaintiff's cork insulation product was inferior and dangerous to be nonactionable, saying this was "but the expression of an unfavorable opinion of the goods of its competitor", not uncommon among rivals in trade, and correctness is for the customer to determine, not the Courts.

Similarly, advertisement which claims that a particular article is the "best" can be treated as harmless hyperbole and, thus, permissible puffing. 1 Callman, *Unfair Competition, Trademarks and Monopoly* (3rd Ed. 1967) §2.2 (c). As long as the article advertised as the "best" is of excellent quality, no action for false and misleading advertising will apply.

"A salesman is permitted to 'puff his wares' and, in saying that a powder actuated tool is safe has merely expressed an opinion." *Hollenbeck v. Ramset Fasteners*, 267 NC 401, 403, 148 SE2d 287, 289 (1966).

"The only evidence [of express warranty] is defendant's testimony that 'the trailer was supposed to last a lifetime and be in perfect condition.' A seller's language to that effect, if used in negotiating a sale, is ordinarily regarded as the expression of opinion in 'the puffing of his wares', and does not create an express warranty." *Performance Motors, Inc., v. Allen*, 280 NC 385, 393; 186 SE2d 161, 166 (1972).

Hyperbole in only a slightly different context was held by this Court to be constitutionally privileged in *Greenbelt Cooperative Publishing Association v. Bresler,* 398 US 6, 90 S.Ct. 1537 (1970). In the *Greenbelt* case, the published charge "blackmail" was under the First Amendment held rhetorical hyperbole and "not slander when spoken, and not libel when reported in the *Greenbelt News Review.*" In the same vein, the television charge of schizophrenia and paranoia made against a business competitor was hyperbole within the ambit of the First Amendment in *Fram v. Yellow Cab Company,* 380 F. Supp. 1314 (WDPA 1974).

POWELL alleges the words in question to be true. Independent of the Jury question of truth, the words "only" and "exclusive" involved here are pale and anemic compared to the more imaginative use of hyperbole in *Bresler* and *Fram.*

This case aptly presents the question of the constitutional privilege of commercial hyperbole under the First Amendment as a matter of law.

This Court has described its function in claims of constitutionally privileged speech as follows:

> "This Court's duty is not limited to the elaboration of constitutional principles; . . . since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' . . . In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see *** whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' . . . We must

> 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Company,* 84 S.Ct. at pp. 728, 729.

Such an examination in this case will surely reveal the words HARRINGTON alleges as offending to be privileged hyperbole. If they are not, it is impossible to see how any sensible distinction can be made between the words that are privileged and those that are not. The resulting confusion could be extremely erosive of First Amendment freedoms.

(3) G.S. 75-1.1 IS LACKING IN FIRST AMENDMENT STANDARDS.

In *New York Times Company v. Sullivan,* 376 US 254, 84 S.Ct. 710 (1964), to protect First Amendment freedoms, this Court held that a public official could not recover in a defamation action unless he could plead and prove Defendant's knowledge of the falsity of the defamation or his reckless disregard of its truth. To satisfy the *Times-Sullivan* rule, actual malice must be proven with convincing clarity. See *St. Amant v. Thompson,* 390 US 727, 731, 88 S.Ct. 1323 (1968). The rule was extended to public figures in *Curtis Publishing Co. v. Butts,* 388 US 130, 87 S.Ct. 1975 (1967). "The *New York Times* standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false." *Garrison v. State of Louisiana,* 379 US 64, 78, 85 S.Ct. 209, 217 (1964).

"On several occasions *Times-Sullivan* has been held applicable to corporate plaintiffs, either because they

were public figures[4] or because they were involved in public interest matters[5]." Stevens, "Talking Back To The Business Critic: The Constitutional Privilege—of—Reply", *The Business Lawyer* (Am. Bar Assoc., Jan. 1976), Volume 31, No. 2, at p. 646.

HARRINGTON, having a business presence and reputation to be injured Ten Million Dollars' worth in all the far-flung places alleged in its Complaint, is upon the allegations of its Complaint a public figure for the purpose of the *Times-Sullivan* rule. It certainly is not the "private individual" of *Gertz v. Robert Welch, Inc.*, 418 US 323, 94 S.Ct. 2997 (1974).

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[4]"Compare *Autobuses Internacionales S. De R.I., Ltd., v. El Continental Publishing Co.*, 483 S.W. 2d 506 (Tex. Civ. App. 1972) (bus company accused of illegally raising its fares held to be a public figure) with *Bavarian Motor Works, Ltd. v. Manchester*, 61 Misc. 2d 309, 305 N.Y.S. 2d 593 (Sup. Ct. 1969) (relatively obscure company said to have gone out of business and into oblivion held not to be a public figure)." *The Business Lawyer*, Vol. 31, Jan. 1976, p. 646, N. 9.

[5]"See, e.g., *Alpine Constr. Co. v. Demaris*, 358 F. Supp. 422 (N.D. Ill. 1973) (Alleged crime syndicate involvement in legitimate business); *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971) (credit bureau practices in releasing credit information); *ABC v. Smith Cabinet Mfg. Co.*, 312 N.E. 2d 85 (Ind. App. 1974) (safety of baby cribs); *Trails West, Inc. v. Wolf*, 32 N.Y. 2d 207, 298 N.E. 2d 52, 344 N.Y.S. 2d 863 (1973) (safety of chartered buses); *Twenty-Five E. 40th St. Rest. Corp. v. Forbes, Inc.*, 37 App. Div. 2d 546, 322 N.Y.S. 2d 408 (1971), aff'd, 30 N.Y. 2d 595, 282 N.E. 2d 118, 331 N.Y.S. 2d 29 (1972) (quality of restaurant food); *Championship Sports, Inc. v. Time, Inc.*, 71 Misc. 2d 887, 336 N.Y.S. 2d 958 (Sup. Ct. 1972) (business aspects of theater television for a championship boxing match)." *The Business Lawyer*, Vol. 31, Jan. 1976, p. 646, N.10.

The two decisions of this Court expressly applying the First Amendment to commercial speech, *Bigelow* and *Virginia State Board of Pharmacy*, do not deal with the *Times-Sullivan* actual malice rule.

The obvious reason for this is that neither case on the facts was a private action for damages like *Times-Sullivan*. Neither case involved allegations of false or defamatory speech. Whether actual malice is the very standard to be applied in the commercial speech context of private damage suits has apparently not been decided. Nor has it been decided by this Court whether a complaining corporate competitor must also meet the public figure, public issue, or comparable standards, when the commercial speech meets the public interest standard of "the free flow of commercial information" enunciated in *Virginia State Board of Pharmacy*, in order for the actual malice or comparable standard to apply. The facts of these cases would seem to meet both standards.

The lesson to be derived from *Times-Sullivan* and its progeny is that a standard such as actual malice is considered necessary to secure the area of First Amendment freedoms from the incursions of private damage suits. The *Times-Sullivan* rule was considered so well qualified to protect speech from private damage suits it was "adopted by analogy" to protect labor debate in *Linn v. United Plant Guard Workers*, 383 US 53, 65, 86 S.Ct. 657, 664 (1966).

In the present case, G.S. 75-1.1 incorporates no such standard—not even a requirement of intent, knowledge, willfulness, or even the negligence of *Gertz*, much less actual malice. The Statute thus falls materially short of meeting First Amendment requirements.

This Court said in *Virginia State Board* that a State may deal "effectively" with the problem of "deceptive or misleading" advertising. 96 S.Ct. at p. 1830. The Federal laws do so. In this context, the great and even startling differences between North Carolina and Federal laws are not only relevant but critical. The broad, vague North Carolina laws punish the initial publication with treble damages in a suit by a competitor. The narrowly specific Federal laws afford an administrative hearing first to determine whether the advertised product is one of those specified, whether the alleged "false advertisement" is "misleading in a material respect", and whether it has been disseminated by the prohibited means and for the prohibited purpose. 15 U.S.C.A. §52 and §55. Only after notice and hearing is a cease and desist order served and only thereafter (and presumably with "knowledge") does violation result in a relatively nominal fine. 15 U.S.C.A. §45 (b)-(e); 16 CFR §§3.11-4.12. A violation of §52 (a) is a misdemeanor when the drug as advertised is harmful to health or is advertised with intent to defraud. 15 U.S.C.A. §54. Again a relatively nominal fine is provided. Attorney's fees in these cases exceed any fine imposable under Federal law.

This Court, in the same context, also said in *Virginia State Board*, "ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else". 96 S.Ct. at p. 1830, n. 24. Such is *not* an apt description of the gravamen of HARRINGTON'S Complaint. HARRINGTON'S complaint is not that POWELL'S CutterBar will not prime tips as advertised, but that POWELL failed to acknowledge HARRINGTON'S downward wiping defoliator would also, a fact POWELL did not and does not believe true.

The Federal Court in *Nonpareil Cork Mfg. Co. v. Heasbey & M. Co., supra,* said competitors' claims were for the marketplace to decide. Headache powders and cold remedies are not involved here, but tobacco combines costing in the range of $15,000.00-$30,000.00. Tobacco farmers, themselves experts, were expected to decide the truth of the ads, which were believed to present a valid point for consideration. Chapter 75 of the General Statutes surprisingly now provides an alternative forum for competitors — the courtroom, where juries composed of office workers and housewives, who never harvested an acre of tobacco, will decide which machine is best and which competitor will be wiped out by treble damages. HARRINGTON, not surprisingly, elected the game of Russian Roulette offered in the alternative, non-expert forum.

(4) G.S. 75-1.1 FLAGRANTLY VIOLATES THE "ACTUAL INJURY" STANDARD IN FIRST AMENDMENT DECISIONS OF THIS COURT.

When a private Plaintiff recovers a verdict for damages pursuant to G.S. 75-1.1, then G.S 75-16 mandates that the Trial Judge treble the verdict in the judgment.

In *Gertz v. Robert Welch, Inc., supra,* this Court held:

> "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." 95 S.Ct. at p. 3012.

The State Statute violates the rule stated by this Court, "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Gertz*, 94 S.Ct. 2997, 3012.

This Court in *Linn v. United Plant Guard Workers*, 383 US 53, 65, 86 S.Ct. 657, 664-5 (1966), held by analogy to First Amendment cases in order to protect labor debate:

> "We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form or harm would be recognized by state tort law. The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that this rule be followed. If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial."

The North Carolina Statute mandating treble recovery improperly preempts the Trial Judge's discretion required to be exercised by *Linn*.

The Oklahoma Supreme Court upon First Amendment grounds recently struck down a provision in an Oklahoma libel statute providing a nominal civil penalty. The Court held:

> "§1446 requires a minimum judgment of not less than one hundred dollars and costs. It makes no requirement of proof as to this minimum amount. This is presumed damage not allowed by *Gertz* without evidence and a finding of actual malice." *Martin v. Griffin Television, Inc.*, —Okl—, 549 P2d 85, 93 (1976).

The mandatory penalty triggered by G.S. 75-1.1 is no less violative of the First Amendment. And in contrast, the North Carolina First Amendment problem is infinitely greater than the Oklahoma problem.

The North Carolina statute not only violates the *New York Times* standard for ascertainment of liability in the first instance, but also First Amendment standards controlling the ascertainment of allowable damages.

(5) THE INTERPRETATION GIVEN THE STATUTE IN THE STATE COURT OBLITERATES THE FIRST AMENDMENT DISTINCTION BETWEEN CONDUCT AND SPEECH CONTENT.

In *Buckley v. Valeo*, 424 US 1, 96 S.Ct. 612, 633-34 (1976), this Court said:

> "The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two . . . For example, in *Cox v. Louisiana* [citation omitted.] the Court contrasted picketing and parading with a newspaper comment and a telegram by a citizen to a public official. The parading and picketing activities were said to constitute conduct 'intertwined with expression and association' whereas the newspaper comment and the telegram were described as a 'pure form of expression' involving 'free speech alone' rather than 'expression mixed with particular conduct.'"

In the present case, only "pure speech" is involved. The State Courts in the interpretation of the Statute in question made no distinction between commercial conduct, lying outside First Amendment protection, and commercial speech lying within. The "broad" interpretation given G.S. 75-1.1 in the Courts below declines to

recognize the First Amendment interest in protection of pure speech, and therefore, violates the United States Constitution.

(6) THE STATUTE IS CONSTRUED TO GRANT TREBLE CIVIL DAMAGE CLAIMS BASED UPON PUBLICATIONS OUTSIDE THE STATE OF NORTH CAROLINA.

An important concern expressed by this Court in *Bigelow* was the extra-territorial effect of the Virginia Statute there involved, saying:

> "Here, Virginia is really asserting an interest in regulating what Virginians may *hear* or *read* about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances." *Bigelow*, 95 S.Ct. at p. 2235.

The situation in the present case is perhaps somewhat the reverse but more extra-territorial in effect. The North Carolina Statute purports to control what South Carolinians, Tennesseans, Canadians, and South Africans may read about products sold by POWELL and HARRINGTON.

The decision in *Virginia State Board of Pharmacy* was apparently predicated primarily upon the public's right to learn the content of the speech in question, in *Bigelow* primarily upon the speaker's right to publish the content. It would also seem though that in each of those cases the rights of both speaker and hearer under the

Federal Constitution were intertwined to a degree. That is true in this case also as to the publications in the United States.

However, the power of the State to control what a speaker present in North Carolina may publish in South Africa apparently has never been decided.

Due Process

" '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law' . . . 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids' . . . 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' " *Cramp v. Board of Public Instruction*, 368 US 278, 287, 82 S.Ct. 275, 280-281 (1961).

In *Cramp*, the words "aid" or "support" or "advice" or "counsel" or "influence" are held too vague to pass constitutional muster. Clearly, the same is true of the words in the penal statute here, "unfair" or "deceptive". This vagueness is compounded by the omission from the State laws of provisions comparable to the false advertising provisions of the Federal Statutes, 15 U.S.C.A. §§52 (a) (1) and 55. Such omission has unimpeachable significance in the interpretation of G.S. 75-1.1 (a).

Construed as the Courts below have construed it, G.S. 75-1.1 is in the best light hopelessly ambiguous. In a more practical light, the Statute has been construed contrary to its obvious intent. Whichever light is proper, the

construction of the Statute renders it violative of the Due Process Clause of the Fourteenth Amendment for vagueness.

"Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or the press suffer." *Ashton v. Kentucky*, 384 US 195, 200, 201, 86 S.Ct. 1407, 1410 (1966).

The Court in *Ashton* further said:

"We agree with the dissenters in the Court of Appeals who stated that: '* * * since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky.'" 86 S.Ct. at p. 1409.

As noted hereinbefore, common law has not recognized a cause of action for "false advertising". This is a newly created cause of action in the Courts below. The nature of that claim must yet be worked out on a case-by-case basis through repeated incursions in the area of First Amendment freedoms—unless this Appeal is sustained.

Final Decree Under 28 U.S.C.A. §1257 (2)

The action of the Supreme Court of North Carolina in conference on September 1, 1976, is a final adjudication of dismissal of POWELL'S Mecklenburg County "passing off" Complaint against HARRINGTON and affirmance of the Court of Appeals' dismissal thereof

upon the ground that POWELL has no substantial First or Fourteenth Amendment challenge to G.S. 75-1.1. Neither the claim alleged in the Mecklenburg Complaint nor the one alleged in the Bertie Complaint was determined on the merits. However, POWELL will never have another opportunity in the State Courts to have those constitutional questions reconsidered in the action instituted in Mecklenburg County. This ought to be final enough. It would further be unreasonable to suppose that a constitutional principle tried, judged, executed, dead and buried in one of two consolidated cases might be alive and well in the other. When the judgment on a first appeal is the law of the case, a judgment on a second appeal is not reviewable by this Court on a writ of error. *Rio Grande Western Railway Company v. Thomas B. Stringham*, 239 US 44, 36 S.Ct. 5 (1915).

The Court of Appeals having dismissed POWELL'S Mecklenburg action upon the ground that the Bertie Complaint constitutionally stated a "false advertising" claim within the purview of G.S. 75-1.1, and this having been affirmed by the Supreme Court, the question would appear settled finally. In arriving at this final judgment, the Court of Appeals and the Supreme Court reviewed the constitutional questions presented and found them on one hand "to be without merit" and on the other hand to present no substantial constitutional question. The fact that the Bertie action is still pending trial makes the judgment on the constitutional question no less final. While the improbable theoretical possibility exists that the North Carolina Supreme Court might at a later date make a discretionary review of the Bertie action and reverse itself and all prior rulings below, the present decree is no less final for purposes of §1257 (2).

In a case in which the judgment being reviewed under 28 U.S.C.A. §1257 (2) was less final than in the present case, this Court said:

> "Moreover, we believe that it serves the policy underlying the requirement of finality in 28 USC §1257 to determine now in which state court appellants may be tried rather than subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings. Accordingly, we note our jurisdiction to hear this appeal under §1257 (2) and turn now to the question of whether appellants may be sued in the Travis County court." *Mercantile National Bank at Dallas v. Langdeau,* 371 US 555, 558, 83 S.Ct. 520, 522.

The still pending case here is in the "category . . . in which there are further proceedings—even entire trials —yet to occur in the state courts but where for one reason or another the Federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corporation v. Cohn,* 420 US 469, 95 S.Ct. 1029, 1038 (1975). While POWELL "may prevail at trial on nonfederal grounds, it is true, but if the . . . Court erroneously upheld the statute, there should be no trial at all." See *Cox Broadcasting Corporation,* 95 S.Ct. at p. 1041. "Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom . . . under the First Amendment,' 'an uneasy and unsettled constitutional posture' . . ." *Cox Broadcasting Corporation,* 95 S.Ct. at p. 1041.

REASONS FOR PLENARY REVIEW

POWELL respectfully submits that the foregoing reasons ought to be sufficient in themselves for plenary review of the constitutional questions presented in this Appeal. There are more.

If the pending case is tried, it will be tried in HARRINGTON'S home County, where it is one of the principal economic forces of the County and its President is a powerful State Senator. Bertie, a thinly populated Eastern North Carolina County, is a long way from POWELL'S home office in the Central Piedmont City of Charlotte. The major part of POWELL'S manufacturing operation is in South Carolina. POWELL is of little economic concern to the citizens of Bertie County; HARRINGTON is of great economic concern.

What HARRINGTON must prove to make out its case has not been determined. The Statute is construed by the State Courts to grant broad relief and the rules of damages may be correspondingly liberalized in HARRINGTON'S favor. The Court may hold that HARRINGTON has made out a case of liability when it proves the publication of the advertisements alleged, which presumably it can do. A liberalized rule of proof of injury might allow HARRINGTON to prove damages by showing loss of profits. Presumably it can do this also. The advertisements would have been published on the eve of the recent business down turn. HARRINGTON was at that time the world's biggest manufacturer of tobacco harvesting machinery.

POWELL has been sued for TEN MILLION DOLLARS ($10,000,000.00) trebled. Should HARRINGTON recover a judgment for its loss of profits in recent years trebled, it is problematical whether POWELL could post

a supersedeas bond in order to effectuate a viable appeal to again reach this Court. This is not a far-fetched suggestion. The Oklahoma Trial Court in *Martin v. Griffin Television, Inc., supra,* permitted such testimony. The opinion says the "bookkeeper testified as to the effect on the business and of business losses". 549 P2d at p. 87. The Jury responded with $55,000.00 actual and $30,000.00 punitive damages. A comparable result in the case here would be catastrophic even if reversed on appeal. The Plaintiff Martin was an infinitely smaller operator than HARRINGTON. He was an individual pet shop proprietor held to be a "private individual" under *Gertz.*

As a more general consideration, it is said unfair practices laws have been adopted in forty-seven (47) States, thirty-four (34) States authorizing private actions and twenty-one (21) providing civil penalties. 5 CCH, *Trade Reg. Rptr.*, par. 50, 190. Permitting the decisions below to stand no doubt would serve to popularize a trend of construing such laws broadly to include "false advertising", i.e., unfair speech content. That these laws will inevitably produce reams of litigation may be verified by observing the number of annotations under 15 U.S.C.A. §45—225 pages. The implications manifestly are not only national but international in scope. As this Court observed in *Bigelow*:

> "If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same." 95 S.Ct. at p. 2236.

HARRINGTON asserted in its Motion to Dismiss for lack of a substantial constitutional question in the North Carolina Supreme Court the reasoning:

> "Petitioner attempts to defeat respondent's action by having the Court declare GS 75-1.1 upon which respondent's claim is based unconstitutional thus causing respondent's claim to fail while allowing petitioner's Mecklenburg Claim to stand. The first cause of action of petitioner's Mecklenburg Claim is founded upon the same Statute." (Appendix B-2)

POWELL'S Mecklenburg County claim was for "passing off", conduct, not speech content. This cause of action was described by this Court in *A.L.A. Schecter Poultry Corp. v. United States,* 295 US 495, 531, 532, 55 S.Ct. 837, 844 (1935):

> " 'Unfair competition', as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader . . . In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, *to the selling of another's goods as one's own*—to misappropriation of what equitably belongs to a competitor." [Emphasis added.]

In *Simmons Company v. Southern Spring Bed Company,* 173 F. Supp. 111 (DCMDNC 1959), the Defendant engaged in "unusual haste" to copy and market Plaintiff's product, beginning with extensive advertising, and the Court remarked:

> "If [defendant's] behavior does not constitute unfair competition, it would be difficult to define what is unfair competition."

G.S. 75-1.1 might constitutionally have been construed to apply to conduct such as POWELL'S passing off claim. Neither the fact that HARRINGTON had the wise foresight to institute its action in Bertie County two weeks prior to engaging in the passing off alleged in POWELL'S Complaint, nor the application of the Statute to passing off claims, if at all, after this appeal, should have any bearing on the determination of the questions presented.

The questions are constitutionally important in their own right and should be so determined.

WHEREFORE, Petitioner respectfully submits that this Appeal should be granted plenary review.

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APPENDIX

APPENDIX A

September 10, 1976

Pritchett, Cooke & Burch
Attorneys at Law
Box 9
Windsor, North Carolina 27983

Re: Manufacturing Company

v.

Manufacturing Company

No. 10PC Fall 1976

Gentlemen:

Defendant and plaintiff's (Harrington Manufacturing Company) motion to dismiss the appeal for lack of a substantial constitutional question is filed with the following order:

> "Allowed by order of the Court in Conference this the 1st day of September, 1976. Exum, J., For the Court."

Yours very truly,

Adrian J. Newton
Clerk of the Supreme Court

AJN:dww

cc: Grier, Parker, Poe, Thompson, Bernstein,
Gage & Preston
Attorneys at Law

No. 10 PC SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1976

* * * * * * * * *

POWELL MANUFACTURING COMPANY, INC., v HARRINGTON MANUFACTURING COMPANY, INC.	*From Mecklenburg* 74-CVS-19797
HARRINGTON MANUFACTURING COMPANY, INC., v POWELL MANUFACTURING COMPANY, INC.	*From Bertie* 74-CVS-459

ORDER

Powell Manufacturing Company, Inc.'s (hereinafter Powell) petition for further review is allowed by the Court in Conference for the limited purpose of entering the following mandates:

(1) The decision of the Court of Appeals dismissing Powell's complaint in Mecklenburg County (74-CVS-19797) is affirmed but with leave to Powell to assert the claims asserted in this complaint in a counterclaim in the Bertie County action (74-CVS-459) filed by Harrington Manufacturing Company, Inc., within thirty days of the certification of this mandate to Mecklenburg County.

(2) The order of the Mecklenburg County Superior Court transferring Powell's claim filed in Mecklenburg County (No. 74-CVS-19797) to Bertie County is reversed and the Clerk of Bertie County is directed to return this case to Mecklenburg County.

Done by the Court in Conference this 1st day of September, 1976.

EXUM, J.

For the Court

cc: Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston,
Attorneys at Law

Mr. Thomas S. Speight, Clerk of Superior Court—Bertie County
Pritchett, Cooke & Burch, Attorneys at Law

Mr. Robert M. Blackburn, Clerk of Superior Court—Mecklenburg County

North Carolina Court of Appeals (766SC100)

APPENDIX B

No. 10PC SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1976

POWELL MANUFACTURING COMPANY, INC.

v

HARRINGTON MANUFACTURING COMPANY, INC.

From Mecklenburg

HARRINGTON MANUFACTURING COMPANY, INC.

v

POWELL MANUFACTURING COMPANY, INC.

From Bertie

NOTICE OF APPEAL
(Filed August 9, 1976)

and

MOTION TO DISMISS APPEAL
(Filed August 11, 1976)

and

PETITION FOR DISCRETIONARY REVIEW UNDER GS 7A-31
(Filed August 9, 1976)

NOTICE OF APPEAL

Powell Manufacturing Company, Inc., Plaintiff in No. 74-CVS-19797 and Defendant in 74-CVS-459 hereby gives Notice of Appeal to the Supreme Court from the judgment of the Court of Appeals in No. 766SC100 filed July 7, 1976 certification date July 27, 1976, pursuant to GS §7A-30 and Rule 14(b) (2) upon the following basis:

1. The constitutional articles and sections asserted to be involved are §§14, 19, 35 and 36 of Article I of the North Carolina Constitution and the first (§1), ninth and fourteenth amendments of the Constitution of the United States.

2. Appellant's constitutional rights thereunder have been violated in that:

A. The Trial Tribunal and the Court of Appeals have construed GS §75-1.1 in a manner so as to render it unconstitutional to the prejudice of Powell in that the Statute has been held applicable to an "unfair advertising" claim (Appellee's Bertie County Complaint) brought thereunder by one competitor (Harrington) against another (Powell) alleging unfair newspaper advertising as to the unique capabilities of the advertiser's (Powell's) equipment. The Statute as so construed is unconstitutional in that: (1) The Statute is void for vagueness and uncertainty and violates the law of the land and due process under North Carolina Constitution Article I, §19 and due process of law under the Fourteenth Amendment of the United States Constitution. The Statute is affected by both patent and latent ambiguities—patent because the statutory phrases "dealings between" and "fair dealings between buyers and sellers" do not ordinarily include such advertising;

latent because the State Legislature did not incorporate into GS §75-1.1, or anywhere in Chapter 75, the advertising section (15 USCA §52) of The Federal Act (15 USCA §45) after which the statute was patterned.

(2) The Construction given the statute by the Trial Tribunals and sustained by the Court of Appeals violates the freedom of speech provisions of the North Carolina Constitution Article I §14 and the First and Fourteenth Amendments of the United States Constitution in purporting to regulate and infringe "commercial speech" in newspapers, radio and television and further incorporating no sufficient constitutional standards to safeguard free speech.

(3) The construction of the Statute by the Trial Tribunals, sustained by the Court of Appeals, invades rights reserved to the people and appellant under §§35 and 36 of the North Carolina Constitution and the Ninth Amendment of the United States Constitution.

B.GS §75.1.1 has been applied by the Court of Appeals in violation of the aforesaid constitutional sections, and to the prejudice of appellant, in holding appellant's complaint originally filed in Mecklenburg County to be a compulsory counterclaim to appellee's complaint filed in Bertie County and ordering the dismissal of appellant's complaint accordingly. The Trial Tribunals in both Bertie and Mecklenburg County have held that NCGS §75-1.1 applies to unfair journal advertising BETWEEN COMPETITORS, an unconstitutional extension of said statute, which has been sustained in the Court of Appeals.

3. The constitutional issues above-mentioned were timely raised in the Trial Tribunals by means of appel-

lant's Motion to Dismiss for failure to state a claim under GS §1A-1, Rule 12 filed in the Bertie County action and due objection and exception made to the Court's order overruling said Motion; by objections, exceptions and appeal from the Order of the Superior Court in Mecklenburg County (in 74-CVS-19797) holding appellant's complaint to be a compulsory counterclaim and ordering its transfer to Bertie County and consolidation with appellee's action pending in Bertie County; and assignments of error in the consolidated Record on Appeal incorporating the aforesaid objections and exceptions in both actions; and in the Court of Appeals by means of argument presented in written brief and oral argument addressed to the constitutional questions. Thereafter the Court of Appeals in fact modified the consolidation order of the Mecklenburg Superior Court and directed the dismissal of appellant's action. The Court ordered dismissal notwithstanding Harrington neither appealed nor cross-assigned the Mecklenburg Court's refusal to dismiss.

4. The Court of Appeals decided the constitutional issues which are the subject of this Notice of Appeal against appellant in holding:

"We have considered Appellant's remaining contentions and find them to be without merit."

PETITION FOR DISCRETIONARY REVIEW UNDER GS §7A-31

Powell Manufacturing Company, Inc., as an alternative to the above Notice of Appeal, hereby petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals filed July 7, 1976, certification date July 27, 1976, in Nc 766SC100, copy attached, upon the following basis:

The Court of Appeals Opinion on its face presents a material misstatement of the important facts of this case.

On September 12, 1974 Harrington sued Powell in Bertie County alleging that Powell had falsely advertised in publications from Africa to Australia that it manufactured the "exclusive Cutter Bar" which was the "only" tobacco harvester which successfully harvested "lugs through tips"—the bottom through the top leaves on the tobacco stalk. Harrington alleged in Bertie County that it manufactured a harvester which also harvested lugs through tips. The harvester which Harrington in its lawsuit alleged harvested lugs through tips was equipped with a "REVOLVING DEFOLIATOR" attachment during and prior to the fall of 1974. Thus, the equipment involved in the Bertie County action is the Powell "Cutter Bar" (which has blades that remove leaves from the tobacco stalk with an upward cutting action, and which is covered by a "Splinter" patent from the Research Corporation in New York, New York) and the Harrington "revolving defoliator" (which has no blades and removes leaves from the stalk with a downward wiping action and which is not covered by a "splinter" patent). The question of law and fact involved in the Bertie County action is whether Powell's journal, newspaper and television advertising of its "CutterBar" was deceptive, and whether Harrington's "revolving defoliator" did or did not effectively harvest lugs and tips.

On November 4, 1974, Powell and Harrington in Mecklenburg County alleging that AFTER the Bertie County suit was filed Harrington held two demonstrations of the successor to its "REVOLVING DEFOLIATOR", which successor was called a "hydro-synchronized blade assembly with splinter knife type defoli-

ators", and that in these demonstrations Harrington had attached a "Cutter Bar" manufactured by Powell to a Harrington harvester and had falsely and deceptively represented the Powell "Cutter Bar" to be Harrington's new "hydro-synchronized blade assembly" which was claimed to be a "major breakthrough." Powell also in its complaint alleged false and deceptive advertising by Harrington of its tobacco barns and curing racks. Powell's Mecklenburg complaint was in the nature of a "passing off" claim actionable at common law and under NCGS §75-1.1. Thus, the equipment involved in the Mecklenburg County action is the Powell Cutter Bar, the Harrington hydro-synchronized blade assembly with splinter knife type defoliator, and both parties curing barns and racks, but not the Harrington REVOLVING DEFOLIATOR. The questions of law and fact involved in the Mecklenburg County action are whether Harrington had passed off Powell's "Cutter Bar" as its own "Hydro-Synchronized Blade Assembly with splinter knife type defoliators" in its fall, 1974 demonstrations, and whether Harrington had falsely advertised tobacco barns and curing racks.

The Court of Appeals' Opinion failed to appreciate the subject matter of the Powell Mecklenburg County Lawsuit, for the Opinion stated that in the Mecklenburg County Suit "Powell alleged that Harrington's 'Roanoke Hydro-Synchronized Blade Assembly' is ESSENTIALLY the same machine as the one manufactured by Powell with the 'Cutter Bar' " (emphasis added). Powell in fact alleged that Harrington had attached a "Cutter Bar" manufactured by Powell to a Harrington harvester and had advertised and demonstrated Powell's "Cutter Bar" to be Harrington's new "Hydro-Synchronized Blade Assembly with a Splinter knife type defoliator" attachment.

The Court of Appeals further erred by relying upon the "logical relationship" test for determining the compulsoriness of a counterclaim in North Carolina. This test had not heretofore been used in North Carolina, as is evidenced by the Court of Appeals use of Wisconsin and Massachusetts opinions to substantiate its choice of tests. Your petitioner asserts that the "logical relationship" test for compulsory counterclaims is overly broad and is inferior to the more familiar "res judicata" or "same evidence" tests for compulsory counterclaims. Your petitioner further asserts that the facts of the Bertie and Mecklenburg claims, when understood, do not meet even the broad logical relationship test, for a central aspect of the Bertie complaint, the Harrington "revolving defoliator," is not involved at all in the Mecklenburg suit, and a central aspect of the Mecklenburg complaint, the Harrington "Hydro-Synchronized Blade Assembly and splinter knife type defoliator," is not involved at all in the Bertie County complaint. Neither is Powell's allegedly "false" advertising in magazines from Africa to Australia "logically related" to Harrington's passing off of a Powell "Cutter Bar" in a field demonstration in Ahoskie, North Carolina. And neither is Powell's allegation involving tobacco barns and curing racks "logically related" to Harrington's allegations of deception in Powell's "Cutter Bar" ads.

Your petitioner asserts that the Court of Appeals below has chosen the wrong rule of law and has applied this rule to a materially erroneous statement of the facts. Error has been committed that will adversely affect the rule as to compulsory counterclaims in North Carolina, and error has been committed that prejudices this petitioner's rights.

The decision of the North Carolina Court of Appeals also erred in the remedy it has mandated in response to the Appellee's Rule 12(b)(1) and Rule 13(a) motions. The opinion merely states that "defendant's motion to dismiss on grounds that the action constituted a compulsory counterclaim should have been allowed. The matter is remanded to Superior Court of Mecklenburg County for entry of an order of dismissal in accordance with this opinion."

This language is error for several reasons:

(a) Harrington did not appeal this lower Court's refusal to dismiss.

(b) There is no mention or guidance by the Court of Appeals as to whether the Order referred to will be with or without prejudice. If it is with prejudice, this petitioner will be foreclosed from litigating the merits of its complaint in any forum, truly a harsh result, especially if Harrington's claim should then be involuntarily or voluntarily dismissed.

(c) This is not a case of compulsory counterclaim, but even if it were a more appropriate remedy would be that of abstention by the Mecklenburg County Court. The decision as to whether to dismiss in Mecklenburg and file counterclaim in Bertie County would then be that of the petitioner.

Error has furthermore been committed in the Trial Tribunal which the Court of Appeals opinion failed to recognize. That error is the Court's first finding of fact in the Order under Appeal which holds that Harrington's Bertie County complaint states a claim "within the scope and purview of NCGS §75-1.1." Your petitioner asserts that this finding is clearly erroneous and that the Bertie County complaint does not state a claim. Thus, the

Powell Mecklenburg suit cannot be a compulsory counterclaim to a claim that does not state a claim. SEE LAWHORN v ATLANTIC REFINING CO., 299 F 2d 353 (5th Cir 1962). The Bertie County complaint does not state a claim for:

(a) By its express terms NCGS §75-1.1 does not provide a cause of action between competitors but only between "buyers and sellers."

(b) NCGS §75-1.1 does not encompass claims for "unfair advertising." 15 USC §45, The Federal Trade Commission Act, is the statute after which NCGS §75-1.1 is patterned. 15 USC §45 is modified and affected by a subsequent statutory section, 15 USC §52, which specifically incorporates "unfair advertising" as a deceptive trade practice under 15 USC §45. Without §52 the Federal Trade Commission Act does not address itself to unfair advertising. The North Carolina statute has no such subsequent modifying section. Thus, the North Carolina Unfair Trade Practices Statute, GS §75-1.1, does not address itself to unfair advertising.

(c) IF the North Carolina Statute §75-1.1 is held applicable to unfair advertising, then the statute must fall under the First and Fourteenth Amendments of the U. S. Constitution. "Commercial Speech" has recently been granted full protection under the First Amendment — SEE VIRGINIA STATE BOARD OF PHARMACY v VIRGINIA CITIZENS CONSUMER COUNCIL, 44 LW 4686 (May 24, 1976). If GS §75-1.1 is held to apply to "Commercial Speech", (*i.e.*, advertising) then it must fall on the grounds of vagueness, overbreadth, and the failure of the statute to incorporate required constitutional protections for such "Commercial Speech."

(d) The advertisement words alleged in the Harrington Bertie complaint to be "deceptive" are mere opinion, sales puffing, and are non-actionable at common law or by statute. SEE HOLLENBECK v FASTENERS CO., 267 NC 401, 148 SE 2d 287 (1966); PERFORMANCE MOTORS, INC. v ALLEN, 280 NC 385, 186 SE 2d 161 (1972); NONPAREIL CORP. MFG. CO. v HEASBEY & M. CO., 108 F 728 (3rd Cir 1901).

A curious contradiction in this case is that the Mecklenburg suit was certified to the Court of Appeals by the Clerk of Bertie County, where it was sent by Judge Hasty. The Court of Appeals opinion, however, was certified to the Clerk of Mecklenburg County. The Mecklenburg County Clerk now has nothing in the POWELL v HARRINGTON file except the Court of Appeals' opinion.

Appellant respectfully submits that the subject matter of this Appeal has significant public interest, the cause involves legal principles of major significance, and that delay in final adjudication is likely to result from failure to certify, within the intent of NCGS §7A-31.

Respectfully submitted,

s/ Gaston H. Gage
s/ William P. Farthing, Jr.
Counsel for Powell Manufacturing Company

GRIER, PARKER, POE, THOMPSON, BERNSTEIN, GAGE & PRESTON
1100 Cameron-Brown Building
301 South McDowell Street
Charlotte, North Carolina 28204
Telephone: 704/372-6730

(Verified by GASTON H. GAGE 6th day of August, 1976.)

CERTIFICATE OF SERVICE AND NOTICE

A copy of the foregoing Notice of Appeal to the Supreme Court of North Carolina and Petition for Discretionary Review, and this notice of the filing of same in the Supreme Court of North Carolina, has been properly mailed, postpaid, addressed to Plaintiff's attorney of record, Stephen R. Burch, Esquire, Post Office Box 9, Windsor, North Carolina 27983, this 7th day of August, 1976.

s/GASTON H. GAGE
Counsel for Petitioner

NO. 766SC100, OPINION OF THE NORTH CAROLINA COURT OF APPEALS
(Filed 7 July 1976)

Appeal by plaintiff Powell Manufacturing Company, Inc., (hereinafter "Powell") from Hasty, Judge. Order entered 5 December 1975 in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 May 1976.

On 12 September 1974, the first of two lawsuits was begun when Harrington Manufacturing Company, Inc., (hereinafter "Harrington") brought action number 74CVS459 in Bertie County, alleging that defendant Powell falsely and fraudulently advertised under Powell manufactured the "exclusive CutterBar", purportedly a unique device on a tobacco harvesting machine. Harrington maintained that Powell's "CutterBar" was remarkably similar to Harrington's splinter-knife defoliator, and it argued that this course of advertising fostered unfair trade competition, engendered a monopolistic business climate, prejudiced and deceived the public, disparaged Harrington's business circumstance and constituted a deceptive act under G.S. 75-1.1 et seq. Harrington sought, inter alia, certain monetary relief.

Powell's answer essentially denied the substantive allegations raised in the Bertie County complaint.

On 4 November 1974, several months after Harrington's action was filed in Bertie County, Powell filed an action against Harrington in the Superior Court of Mecklenburg County. Powell alleged that Harrington's "Roanoke Hydro-synchronized Blade Assembly", being advertised by Harrington as a "dramatic breakthrough

in harvesting tobacco" is essentially the same machine as the one manufactured by Powell with the "Cutter-Bar". Powell asserted similar allegations regarding Harrington's advertising of curing racks and barns, and alleged that Harrington's purported misrepresentations were maliciously, unethically, and wilfully disseminated to the public, and were unfair and deceptive methods of competition under G.S. 75-1.1.

Harrington moved to dismiss Powell's complaint in action 74CVS19797 on grounds that Powell's allegations should have been raised as compulsory counterclaims in Harrington's Bertie County action 74CVS459. Harrington attacked the Mecklenburg County action on the basis of Rules 12(b)(1) and 13(a) of the North Carolina Rules of Civil Procedure.

In its order, filed 5 December 1975, the Mecklenburg County trial court, first found that both "parties allege in their respective actions identified hereinabove that they manufactured a tobacco harvesting combine sold throughout the tobacco growing areas of the southeast, and that the adverse party has falsely advertised and represented its respective machine." It then concluded, inter alia, that the ". . . claim set forth by Powell Manufacturing Company, Inc., in this action constitutes a compulsory Counterclaim in that action entitled Harrington Manufacturing Company vs. Powell Manufacturing Company, File No. 74-CVS-459, filed in Bertie County on September 12, 1974, and is required to be stated in said action in Bertie County." The court ordered consolidation of the Mecklenburg action with the Bertie County lawsuit. Powell, plaintiff herein, appeals.

Other facts necessary for decision are set out in the opinion.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage, for plaintiff appellant.

Pritchett, Cooke & Burch, by Stephen R. Burch and William W. Pritchett, Jr., for defendant appellee.

ARNOLD, Judge.

Appellant contends that its Mecklenburg County complaint is not a compulsory counterclaim because it does not arise out of the same transaction or occurrence as that alleged in appellee's Bertie County claim. We disagree.

G.S. 1A-1, Rule 13(a), provides in pertinent part that:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if
>
> (1) At the time the action was commenced the claim was the subject of another pending action, or
>
> (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule."

Here, a critical reading of the pleadings indicates that all of the allegations relate to and arise out of the same competitive advertising practices regarding technically sophisticated mechanical tobacco harvesters. Both parties have packaged sales programs designed to reach

the same markets, and whether unlawful acts were committed in the course of these endeavors is a subject matter which ought to be litigated and resolved in the context of one lawsuit. See: Hy-way Heat Systems, Inc. v. Jadair, Inc., 311 F. Supp. 454 (E.D. Wis. 1970); United Fruit Co. v. Standard Fruit and Steamship Co., 282 F. Supp. 338 (Mass. 1968). As the Federal District Court, analyzing the similarly drawn Federal rule, stated at page 456 in the apparently analogous case of Hy-way Heat Systems, ". . . [b]oth claims deal with misrepresentation of the defendants' products, although from divergent standpoints . . . [and] [b]oth parties are competing for the same customers . . . [while allegedly] using basically the same unfair methods."

Appellant's action in Mecklenburg County involves purported false advertising concerning mechanical tobacco harvesters. The relationship of its claim to appellee's action in Bertie County, also involving purported false advertising of mechanical tobacco harvesters, is so logical that it must be asserted as a counterclaim in the Bertie action. A compulsory counterclaim is not limited to facts alleged in the original complaint, but includes logically related acts and conduct involving the parties. United Fruit Co., supra, at 339.

We have considered appellant's remaining contentions and find them to be without merit.

Appellant's action must be asserted as a compulsory counterclaim in defendant's action filed in Bertie County [74CVS459]. Therefore, defendant's motion to dismiss on grounds that the action constituted a compulsory counterclaim should have been allowed. The matter is remanded to Superior Court of Mecklenburg County for entry of an order of dismissal in accordance with this opinion.

Remanded.

Chief Judge BROCK and Judge BRITT concur.

A TRUE COPY — CLERK OF THE COURT OF APPEALS OF NORTH CAROLINA

By s/DOLLY D. HICKS, Deputy Clerk, July 8, 1976.

MOTION TO DISMISS AND RESPONSE TO PETITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA:

Your respondent, Harrington Manufacturing Company, Inc., who is the plaintiff above, hereby answers Notice of Appeal filed in this cause by the defendant and respectfully shows unto the Court;

1. Petitioner attempts to defeat respondent's action by having the Court declare GS 75-1.1 upon which respondent's claim is based unconstitutional thus causing respondent's claim to fail while allowing petitioner's Mecklenburg Claim to stand. The first cause of action of petitioner's Mecklenburg Claim is founded upon the same Statute.

Neither the Bertie or Mecklenburg Superior Courts nor the Court of Appeals have shown any difficulty in viewing the alleged actions of plaintiff as coming within the purview of the forbidden practices of said Statute. Respondent respectfully submits that the action complained of in its complaint constitutes a matter prohibited by the Statute and that in no way have the constitutional rights of petitioner been violated or infringed.

2. The advertising of which respondent complains was that of the petitioner, which stated that it had the only tobacco harvester which would harvest lugs through tips and that it owned the "exclusive Cutter-Bar" for removing tobacco leaves from the stalk. Petitioner has consistently attempted to modify the objectionable language since institution of this action by the

addition of the words "successfully or effectively" in describing the harvesting of lugs through tips. Petitioner has sought to bring many collateral matters before the Court, including the modification of respondent's equipment offered for sale the following year.

Respondent respectfully contends that advertising by a competitor that it has the ONLY machine that will do a particular act, if untrue, constitutes an unfair method of competition and an unfair or deceptive act or practice prohibited by the North Carolina Statute. There is no logical reason to support petitioner's argument in its brief that because the Federal Statute has a sub-division pertaining to advertising per se that this, in itself negatives the intent of the North Carolina Legislature to include such acts within the above cited Statute.

3. Within a matter of a few weeks after the Harrington suit was filed in Bertie County, Powell filed an action in Mecklenburg County. Both actions were concerned with the advertising of tobacco harvesting equipment for sale to the same customers at the same period of time.

4. The Court of Appeals agreed with the Mecklenburg County Trial Court that respondent's motion was proper and should be granted in that the matters alleged by petitioner in Mecklenburg County constituted a compulsory counterclaim in the prior pending lawsuit in Bertie County. The Court concluded there was a logical relationship between the matters alleged in each county and stated that a compulsory counterclaim is not limited to facts alleged in the original complaint, but includes logically related acts and conduct involving the parties.

Respondent further submits that this decision by the Court of Appeals will effectively estop the type of action pursued by the petitioner in this case, to wit, filing related claims in a separate action in a home forum rather than raising the matters in an answer to a prior pending action.

Respondent respectfully submits that petitioner's Notice of Appeal and Petition for Discretionary Review be denied.

This the 10th day of August, 1976.

PRITCHETT, COOKE & BURCH
s/W. W. Pritchett, Jr.
s/S. R. Burch
Attorneys for Harrington
Manufacturing Co., Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing response to the defendant's Notice of Appeal has this day been properly mailed, postage paid by depositing a copy of the same in a properly addressed envelope to defendant's attorney of record, Mr. Gaston H. Gage, Attorney at Law, Post Office Box 4090, Charlotte, North Carolina 28204, this the 10th day of August, 1976.

PRITCHETT, COOKE & BURCH
s/W. W. Pritchett, Jr.
Post Office Box 9
Windsor, North Carolina 27983
Telephone: (919) 794-3161

APPENDIX C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA
BERTIE COUNTY

Bertie County
FILED
Dec. 18, 1974
At .. O'Clock .. M.
Thomas S. Speight
Clerk of Superior Court

Harrington Manufacturing
Company, Inc.

vs.

ORDER

Powell Manufacturing
Company, Inc.

* * * * * * * * *

This matter coming on to be heard, and being heard by the Honorable Perry Martin on December 11, 1974, at 2:30 p.m. at New Bern, North Carolina. The defendant being represented by Gaston H. Gage, of Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, Charlotte, North Carolina, and the plaintiff being represented by W. W. Pritchett, Jr., of Pritchett, Cooke & Burch, Windsor, North Carolina; before hearing arguments by counsel it is stipulated by and between counsel that the motion to dismiss, pursuant to Rule 12 filed by the defendant on October 23, 1974, will also apply to the amended complaint filed by the plaintiff on December 6, 1974, as well as the original complaint.

After hearing arguments by counsel for the defendant and the plaintiff, the motion to dismiss filed by the defendant is denied and the defendant shall be given thirty days from today's date to file answer to the plaintiff's amended complaint.

This the 11th day of December, 1974.

/s/Perry Martin

Judge Presiding

Defendant in apt time objects and excepts to the entry of the above order.

This the 11th day of December, 1974.

/s/Perry Martin

Judge Presiding

APPENDIX D

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
74 CVS 19797

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

Mecklenburg County
FILED
Dec. 5, 1975
At 11:00 O'Clock A.M.
Robert M. Blackburn
Clerk of Superior Court

POWELL MANUFACTURING COMPANY, INC.,
Plaintiff,

vs.

HARRINGTON MANUFACTURING COMPANY, INC.,
Defendant.

ORDER

THIS MATTER, coming on for hearing and being heard on June 26, 1975 before the Honorable Fred H. Hasty, Superior Court Judge for Mecklenburg County, upon Defendant's motion to dismiss pursuant to Rules 12 (b) and 13 (a) of the North Carolina Rules of Civil Procedure; and the Court having reviewed the file herein, consider briefs and memorandums of law submitted by the parties and having heard argument of counsel for both sides, the Plaintiff represented by Gaston H. Gage and the Defendant being represented by Stephen R. Burch, William W. Pritchett, Jr. and H. Edward Knox makes the following findings of fact:

1. Defendant, Harrington Manufacturing Company, Inc., filed an action in Bertie County, North Carolina entitled Harrington Manufacturing Com-

pany, Inc. vs. Powell Manufacturing Company, Inc. File No. 74-CVS 459, on September 12, 1974 alleging unfair methods of competition and unfair trade acts or practices on the part of Powell Manufacturing Company, Inc., within the scope and purview of *N.C.G.S.* §75-1.1. (Exception No. 2)

2. On October 4, 1974, Powell Manufacturing Company, Inc. filed an action in Mecklenburg County entitled Powell Manufacturing Company, Inc. vs. Harrington Manufacturing Company, Inc., File No. 74-CVS-19797, wherein Powell Manufacturing Company, Inc., alleges that Harrington Manufacturing Company, Inc. has engaged in certain unfair methods of competition and unfair trade acts or practices.

3. Both parties allege in their respective actions identified hereinabove that they manufacture a tobacco harvesting combine sold throughout the tobacco growing areas of the southeast, and that the adverse party has falsely advertised and represented its respective machine. (Exception No. 3)

4. The claims set forth by the parties in this and the Bertie County actions arise out of, relate to and are based upon competition between Plaintiff and Defendant for the same market. (Exception No. 4)

5. Since the institution of the above-captioned action of Powell Manufacturing Company, Inc., the Plaintiff herein has taken a number of depositions and by stipulation between the parties, all but two of said depositions have been filed and made a part of the record in this action and in the action

by Harrington Manufacturing Company, Inc. in Bertie County. (Exception No. 5)

6. The claim asserted by Powell Manufacturing Company, Inc. in this action arises out of the same subject matter as the claim stated by Harrington Manufacturing Company, Inc. in its action in Bertie County, and the aforementioned claim of Powell Manufacturing Company, Inc. was in existence at the time the pleading in the Harrington Manufacturing Company, Inc. action filed in Bertie County was served upon the Plaintiff herein. (Exception No. 6)

7. The adjudication of the issues contained in this action in the Bertie County action would not require the presence of third parties over whom the Court cannot acquire jurisdiction. (Exception No. 7)

8. That the ends of justice will best be served by the consolidation of this action with the action by Harrington Manufacturing Company in Bertie County and an adjudication of all issues raised in the aforementioned cases in one, rather than separate trials. (Exception No. 8)

BASED UPON THE FOREGOING FINDINGS OF FACT the Court concludes as a matter of law that:

1. The claim set forth by Powell Manufacturing Company, Inc. in this action constitutes a compulsory Counterclaim in that action entitled Harrington Manufacturing Company vs. Powell Manufacturing Company, File No. 74-CVS-459, filed in Bertie County on September 12, 1974, and is required to be stated in said action in Bertie County. (Exception No. 9)

2. This action by Powell Manufacturing Company, Inc. should be transferred to Bertie County and consolidated with the action by Harrington Manufacturing Company, Inc. bearing File No. 74-CVS-459. (Exception No. 10)

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court in its discretion orders that Powell Manufacturing Company, Inc. vs. Harrington Manufacturing Company, Inc., 74-CVS-19797, be consolidated with Harrington Manufacturing Company, Inc. vs. Powell Manufacturing Company, Inc., Bertie County File No. 74-CVS-459; it is further ordered that the Clerk of Superior Court for Mecklenburg County transfer and certify the record in this action (Powell Manufacturing Company vs. Harrington Manufacturing Company, Mecklenburg County File No. 74-CVS-19797) to Bertie County for further proceedings therein.

This the 28th day of November, 1975.

/s/Fred H. Hasty

Judge Presiding

The plaintiff in apt time objects and excepts to the signing and entry of the foregoing Order.

This 28th day of November, 1975. (Exception No. 11)

/s/ Fred H. Hasty

Fred H. Hasty
Senior Resident Superior Court Judge

APPENDIX E

No. 10 PC — SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
Fall Term 1976

* * * * * * * * *

FILED
Sept. 24, 1976
At 8:36 O'Clock A.M.
In the Office of
Clerk of Supreme Court
of North Carolina

POWELL MANUFACTURING COMPANY, INC., *Appellant,*
-VS.-
HARRINGTON MANUFACTURING COMPANY, INC., *Appellee.*
} *From Mecklenburg* 74-CVS-19797

HARRINGTON MANUFACTURING COMPANY, INC., *Appellee,*
-VS.-
POWELL MANUFACTURING COMPANY, INC., *Appellant.*
} *From Bertie* 74-CVS-459

* * * * * * * * *

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

* * * * * * * * *

I. Notice is hereby given that POWELL MANUFACTURING COMPANY, INC., the above-named Appellant, (POWELL) hereby appeals to the Supreme Court of the United States from the final judgment or decree of the Supreme Court of North Carolina affirming the judgment of the Court of Appeals of North Carolina and

dismissing Appellant's Appeal to the North Carolina Supreme Court for lack of a substantial constitutional question entered in this consolidated action on the first day of September, 1976.

This Appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) The record in No. 766SC100, North Carolina Court of Appeals, Sixth District, in the above-entitled matters stipulated by counsel and dated January 28, 1976, and certified by the Clerk of Superior Court of Bertie County and filed in Court of Appeals February 2, 1976.

(2) Appellant's Brief (POWELL) (Filed February 23, 1976, in the North Carolina Court of Appeals) in No. 766SC100.

(3) POWELL'S "Notice of Appeal" (Filed in the North Carolina Supreme Court August 9, 1976) and HARRINGTON'S "Motion to Dismiss Appeal" (Filed in the North Carolina Supreme Court August 11, 1976) and POWELL'S "Petition for Discretionary Review under G.S. 7A-31" (Filed in the North Carolina Supreme Court August 9, 1976) in No. 10 PC Fall 1976; and No. 766SC100, Opinion of the North Carolina Court of Appeals (Filed July 1976).

(4) Appellant's New Brief (POWELL) filed in the North Carolina Supreme Court in No. 10 PC (served August 27, 1976).

(5) The Order of the North Carolina Supreme Court of the first day of September, 1976, allowing POWELL'S "Petition for Further Review" for the "limited purpose of entering" certain mandates in No. 10 PC Fall 1976.

(6) The Order of the North Carolina Supreme Court of the first day of September, 1976, allowing Appellee's Motion to Dismiss POWELL'S Appeal under G.S. 7A-30 for lack of a substantial constitutional question in No. 10 PC Fall 1976.

(7) This Notice of Appeal to the Supreme Court of the United States filed in No. 10 PC Fall 1976 in the North Carolina Supreme Court.

III. The following questions are presented by this Appeal:

(1) Does Section 75-1.1 (as implemented by Section 75-16) of the North Carolina General Statutes as construed by the North Carolina Courts, a penal statute affording a competitor treble damages in *claims founded on commercial speech,* violate the First and Fourteenth Amendments of the Constitution of the United States by reason of *overbreadth* and lack of First Amendment standards?

(2) Does Section 75-1.1 (as implemented by Section 75-16) of the North Carolina General Statutes as construed by the North Carolina Courts, a penal statute affording a competitor treble damages in claims founded on *constitutionally privileged commercial speech,* violate the First and Fourteenth Amendments of the United States Constitution?

(3) Does Section 75-1.1 (as implemented by Section 75-16) of the North Carolina General Statutes

as construed by the North Carolina Courts, a penal statute allowing treble damages in the area of First Amendment freedoms, violate *due process* requirements of the Fourteenth Amendment for *overbreadth, ambiguity, vagueness,* and *lack of standards* in the definition of commercial speech claims for which treble recovery is mandated?

(4) Does the highest state court's final judgment or decree tolerating an overbroad, vague and ambiguous State penal statute in the area of First Amendment freedoms present a substantial question under the Constitution and laws of the United States when the statute is enforced in this consolidated record for the dual purpose: (a) of sustaining Appellee's complaint against Appellant for treble damages founded on commercial speech alleged to have been published in widespread areas of the world; and (b) of sustaining a judgment dismissing Appellant's action?

[Signed] GASTON H. GAGE

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CERTIFICATE OF SERVICE

I, GASTON H. GAGE, an Attorney for POWELL MANUFACTURING COMPANY, INC., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23 day of September, 1976, I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on Appellee, HARRINGTON MANUFACTURING COMPANY, INC., by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its Attorney of record as follows:

STEPHEN R. BURCH, Esquire
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